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Federal Communications Commission
WASHINGTON, D. C.

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
The Telephone Consumer Protection)
Act of 1991)

CC Docket No. 92-90

To: The Commission

COMMENTS OF LEJEUNE ASSOCIATES
OF FLORIDA

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SUMMARY

LeJeune Associates of Florida provides telephone equipment and software to the telemarketing industry. These products include features that can automatically block attempts to reach numbers on "Do Not Call" lists. Telemarketers are using the LeJeune system to comply with Florida laws prohibiting telephone solicitations to consumers who list their numbers on a database maintained by the state.

The Florida experience demonstrates that a national database system is the most practical and cost-efficient solution to the problem of intrusive telemarketing addressed in the Telephone Consumer Protection Act of 1991. In that Act Congress concluded that unwanted telephone solicitations have become a serious problem affecting consumer privacy rights. The TCPA makes clear that both live operator and automated telemarketing can be objectionable, and hence both should be subject to restriction.

Having decided that rules are necessary to permit consumers to restrict solicitations to their home, Congress required the Commission to adopt "methods and procedures" for that purpose. The Act and its legislative history demonstrate a strong interest in creation of a national database. However, Congress apparently was concerned that this solution might not be practical given the importance of adopting an efficient

restriction system quickly. As a result, the Commission was given discretion to consider alternative procedures.

It is correct that an on-line interactive national database is not currently feasible. However, experience in Florida indicates that a database system can achieve virtually all of the goals of the TCPA when information is distributed by computer-readable or print media on a regular basis. As discussed in more detail in these comments, a national database can be funded through modest charges to telemarketers, with no expense to either consumers who wish to participate or the Commission itself. The Commission can select a database vendor through a simple RFP process, just as it selects a bank to receive fee payments or a commercial copy center. Thereafter that vendor can assume responsibility for all database administration. Consumers can restrict their number through a simple toll-free call. Telemarketers can obtain updated lists of restricted numbers for the area they wish to solicit -- whether a single area code or region, or the nation as a whole. Products like the LeJeune system are available to make compliance simple and non-burdensome. Finally, all parties would have the benefit of a bright-line rule as to when a number is restricted -- either it is in the database or it is not. Such a clear standard is important to avoid unnecessary disputes given the multiple enforcement mechanisms of the Act.

As a member of the telemarketing community, LeJeune believes that a national database would provide important benefits for the industry. First, if a single national system is developed, states will feel less need to adopt their own individual restrictions, such as those now under consideration in many jurisdictions. The cost of complying with these multiple solicitation rules could chill use of telemarketing to reach otherwise willing customers, or at least reverse the trend toward nationwide telemarketing services. Second, a national database would reduce telemarketing costs by providing an efficient means of identifying those consumers who are not receptive to telephone solicitation. Marketers could save on sales staff time, toll costs, and similar expenses. Third, the database system addresses the problem of the few abusive telemarketers whose conduct imposes costs on others by tarnishing the image of the entire industry.

None of the other "methods and procedures" under consideration satisfies the mandate of the TCPA as well as a national database. Network technologies are not currently practical. Mandatory systems of directory markings could accomplish the same benefits as a national database, but at far higher cost to consumers, telephone companies, telemarketers and the Commission. Mandatory industry or company lists would not protect the privacy rights of consumers who want relief from all solicitations. They also would require far more

complex regulation by this Commission concerning how such lists are assembled and circulated. In addition, this process would place an unreasonable burden on consumers who wish to become listed, and result in far more litigation over whether a violation has occurred in a given case. Time-of-day restrictions do not address the problem identified by Congress.

In short, a national database system is the most practical and cost-efficient solution to the problems addressed by Congress in the TCPA. It provides a means of relief for consumers at no cost to them. It can be established and maintained without the use of taxpayer funds. And a national database would impose the lowest compliance costs on telemarketers. Indeed, the database can improve telemarketing efficiency by spreading compliance costs across the industry as a whole, eliminating the need for states to adopt mutually-inconsistent regulations, and providing a simple means of avoiding sales expenses incurred today to solicit unwilling consumers.

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INTRODUCTION

LeJeune strongly supports implementation of a national database of residential subscribers who object to receiving telephone solicitations. As discussed below, a national database is the most practical and cost-efficient solution to

the problem of intrusive telemarketing addressed by Congress in the Telephone Consumer Protection Act of 1991 ("TCPA"). 1/

LeJeune is particularly qualified to comment in this proceeding due to its practical experience with telemarketing restrictions. LeJeune provides telephone equipment and related software that automatically blocks attempts to reach numbers on "Do Not Call" lists. This Sales-Call Restriction System ("SRS") is installed at a telemarketer's premises and integrated with its outbound lines. The SRS compares the number of each call placed by the telemarketer against a database of restricted numbers. Calls to numbers in the database are blocked, and a distinct tone signalling a restricted call attempt is heard. All other calls are instantly completed. The LeJeune SRS is simple to maintain. Telemarketers can update restriction lists provided on diskette in minutes. Individual telephone numbers can be added or deleted manually.

Currently the LeJeune SRS and similar systems are used by telemarketers throughout Florida to comply with that state's Telephonic Sales Act. 2/ Our experience establishes that an

1/ Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

2/ The Florida Telephonic Sales Act, Fla. Stat. ch. 501.059 (1990) [hereinafter Florida Act].

effective database system is available now and that the Florida model can easily be adopted on a national level. We stress, however, that "Do Not Call" compliance is only one reason telemarketers value the SRS. Call restriction technology permits telemarketers to use their sales forces more economically. The LeJeune SRS, for example, permits users to customize their database, blocking calls to locations outside a marketer's service territory, to specific prospects who have demonstrated no interest, or to prospects who have indicated time of day preferences for calls. As a result, telemarketers save toll charges, sales staff time, and other administrative costs. In short, technology is in service today that would easily permit compliance with national database sales restrictions, while making telemarketing to willing customers more efficient.

In the comments that follow LeJeune discusses in more detail why a national database should be adopted. Congress has clearly stated that the Commission "shall prescribe regulations to implement methods and procedures for protecting privacy rights." ^{3/} Congress reached this conclusion based on an extensive record that intrusive telephone solicitations are an increasing national problem. Only a national database system

^{3/} 47 U.S.C. § 227(c)(2) (Supp. 1992).

satisfies the intent of the TCPA in a complete and cost-effective manner.

I. THE COMMISSION MUST ADOPT NATIONAL RESTRICTIONS ON UNWANTED TELEPHONE SOLICITATIONS.

- A. Congress correctly recognized that telemarketing can invade consumer privacy and that appropriate restrictions are necessary.

The TCPA is intended to provide residential telephone subscribers with a means to avoid unwanted solicitations. The Act requires the Commission to conduct this relatively expedited rulemaking so that "methods and procedures for protecting the privacy rights" of consumers are adopted by this September. ^{4/} The Act generally defers to the Commission as to precisely which "methods" would be most efficient and effective. At the same time, however, Congress demonstrated a strong interest in a national database system. Congress recognized that such a system could, if workable and economical, best meet the TCPA's goals.

Some statements in the Notice could be read to suggest that the Commission believes it has discretion not to regulate live solicitations at all. However, any such interpretation of the TCPA would contradict both the Act itself and its clear

^{4/} TCPA, § 2(1).

legislative history. First, the Act specifically finds that "[t]he use of the telephone to market goods and services to the home and other businesses is now pervasive." 5/ If unrestricted, telemarketing "can be an intrusive invasion of privacy." 6/ Further, the Act states that "[m]any consumers are outraged over the proliferation of [telephone solicitations] to their homes." 7/ Consequently, the Act affirmatively requires the Commission to "prescribe regulations * * * for protecting the privacy rights [of residential telephone subscribers]." 8/

The legislative history of the Act clarifies and reinforces congressional intent that the Commission restrict telemarketing to consumers that object to receiving calls. Senator Pressler, a chief sponsor of the legislation, stated that its purpose was "to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations." 9/ More specifically, the Act was to "prohibit

5/ Id.

6/ Id. at § 2(5).

7/ Id. at § 2(6).

8/ 47 U.S.C. § 227.

9/ 137 Cong. Rec. S16,201 (daily ed. Nov. 7, 1991) (statement of Sen. Pressler).

cold calls by any telemarketer to the telephone of a consumer * * * who has affirmatively taken action to prevent such calls." 10/

Similarly, Congressman Markey, principal sponsor of the House legislation, explained that Congress was "sending instructions over to the FCC that we want them to begin the process here of shutting down the abuse of the telephones * * * that have grown over the last half a decade." 11/ According to co-sponsor Congressman Rinaldo, the legislation "directs the FCC to determine the most effective and efficient method of allowing telephone subscribers to avoid live telephone solicitation calls." 12/

The evidence clearly supports Congress's findings and the conclusion that FCC regulations are necessary. Since 1980 when the FCC first visited this issue, telemarketing calls, especially interstate calls, have increased dramatically. Many businesses subcontract their national solicitation campaigns to large, centrally located telemarketing centers. Rapidly

10/ Id. at S16,202.

11/ 137 Cong. Rec. H11,314 (daily ed. Nov. 26, 1991) (statement of Rep. Markey).

12/ Id. at H11,311 (statement of Rep. Rinaldo).

expanding technology and the reduced cost of long distance service have contributed to the explosion of unsolicited calls.

Citizens will voice their objections to unsolicited calls if given the opportunity. They have registered their complaints loudly with state and local legislators and officials. The Act observes that "over half the States now have statutes restricting various uses of the telephone for marketing." 13/ According to the American Telemarketing Association, in January of 1992, 44 states had new telemarketing bills under consideration, and almost a fourth of them address the problem of unsolicited phone calls. 14/ Congress has received numerous constituent complaints as well. Indeed, the impetus for the legislation was largely persistent constituent complaints about current unrestricted telemarketing practices. 15/

13/ TCPA § 2(7).

14/ Texas Brokers on Hold, Registered Representative, April 1992, at 16.

15/ See, e.g., 137 Cong. Rec. S16,203-04 (remarks of Sen. Hollings).

The Commission itself indicates that it received over 750 complaints regarding unsolicited telemarketing in 1991. 16/ This level of concern is remarkable given that in 1980 the FCC expressly disclaimed any interest in regulating telemarketing. 17/ Many consumers believe that the Commission is only involved in the more technical aspects of telephone communications. 18/ These people would most likely address their complaints to other individuals and agencies. 19/

In the absence of telemarketing regulations, many citizens are so frustrated that they have turned to other means, however inadequate. The Direct Marketing Association, for instance, maintains a national "Do Not Call" list for its

16/ Notice, at para. 24. The Senate Commerce Committee report on S. 1410 reveals that in the year preceding that report, the FCC received over 2,300 complaints about telemarketing calls. S. Rep. No. 177, 102d Cong., 1st Sess. 1 (1991).

17/ See In re Unsolicited Telephone Calls, CC Docket No. 78-100, 77 F.C.C.2d 1023 (1980).

18/ Hence, it is not surprising that complaints involving telephone technology and automation, such as auto dialers, are frequently addressed to the Commission, whereas complaints about live telemarketing are more often directed to others. The Commission cannot conclude on this basis that live solicitations are not a problem. See Section I.B. infra.

19/ The Committee Report on S. 1410 notes that: "The Federal Trade Commission, State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints." S. Rep. No. 177, 102d Cong., 1st Sess. 1-2 (1991).

members. Most people on the list do not realize a substantial reduction in unwanted calls because use of the list is entirely voluntary. Despite that fact, the Association subscription form indicates that as of July 1991, 440,000 consumers had contacted the Association at their own expense to be included on the list, hoping to rid their homes of unwanted intrusions by telemarketers. 20/

The State of Florida's experience with telemarketing regulation is further evidence that the nation's consumers lack only an effective means to voice their objections. In September 1990, the Florida legislature passed a statewide nonsolicitation statute, which took effect on October 1, 1990. 21/ Pursuant to that statute, residential phone customers may opt to be included in the state-administered database for a \$10.00 fee for the first year and an annual renewal charge of \$5.00. Prior to the availability of a publicized vehicle for complaints in Florida, citizen dissatisfaction with intrusive telephone solicitations was vastly underreported. Complaints to the Department of Consumer Services numbered less than 50 each year. Following the

20/ Private Citizen, Inc., a privacy rights advocate, also compiles a list that it claims to distribute to over 750 telemarketing firms.

21/ Florida Act, Fla. Stat. ch. 501.059 (1990).

establishment of Florida's "Do Not Call" system, however, the number of complaints vaulted to between 300 and 500 per month. 22/ In addition, more than 25,000 subscribers have paid the required fees to be included in the state database in the hope of ending unwanted intrusions upon their privacy. 23/

Congress enacted the TCPA because it recognized the need to address widespread consumer dissatisfaction with unwanted telephone solicitations. Significantly, the Act does not direct the FCC to reconsider Congress's judgment that telemarketing restrictions are necessary in the first instance. Both the plain language of the Act and the legislative history clearly demonstrate that Congress intended the Commission to promulgate regulations to curtail telemarketing to consumers who object to such calls. Only the "methods and procedures" for call restriction are left to the Commission's discretion.

22/ Complaint data provided to LeJeune by the Florida Department of Consumer Services.

23/ William M. Bulkeley, Congress's 'Cure' for Junk Calls Faces a Skeptical FCC, Wall St. J., May 19, 1992, at B6.

- B. Automatic dialers are not the primary problem, so FCC restrictions on their use would not be sufficient to protect privacy interests.

LeJeune strongly disagrees with the suggestion in the Notice that the Commission might satisfy its obligations under the TCPA if it restricts only those unsolicited calls using auto dialers. The Notice states that there may be an "inherent difference in the nuisance factor of auto dialer calls as opposed to live solicitations," 24/ and suggests that consumers may not consider live telemarketing to be a significant invasion of their privacy. The Commission supports this proposition in part by reference to the fact that auto dialer cases make up the majority of FCC complaints in the solicitation area. However, as discussed above, FCC complaints are not indicative of the magnitude of subscriber dissatisfaction with live solicitations. Consumers are more likely to contact the FCC to register grievances about technical concerns, such as auto dialers, than about live solicitations, particularly given the Commission's past refusal to regulate solicitations.

The Commission also points to statements in the legislative history that it suggests may indicate a primary

24/ Notice at para. 23.

congressional concern with automated calls. 25/ However, such a reading of the record would be incomplete at best. The TCPA was the result of a joining of two distinct legislative concerns. The first, initially addressed in bills sponsored by Congressman Markey (H.R. 1304) and Senator Pressler (S. 1410), is unwanted, live telephone solicitation. The second concern, originally addressed in Senator Hollings' S. 1462, is the use of automatic dialing equipment in telemarketing. The final legislation, while approved in the form of amendments to S. 1462, incorporates a distinct section drawn from the Markey-Pressler bills covering the subject of live telephone solicitations. 26/

Clearly, then, Congress felt that the restrictions on auto dialer calls contained in the original version of S. 1462 were not sufficient -- live solicitations also required attention. This point was emphasized in the floor debates. For example, Congressman Markey stated that the purpose of the legislation was to "secure an individual's right to privacy that might be unintentionally intruded upon * * *. For this reason the legislation addresses live unsolicited commercial

25/ See Notice at paras. 23-26.

26/ 47 U.S.C. Sec. 227(c).

telemarketing to residential subscribers." 27/ Similarly, Congressman Rinaldo noted that the legislation "directs the FCC to determine the most effective and efficient method of allowing telephone subscribers to avoid live telephone solicitation calls." 28/

LeJeune believes that if anything, autodialed calls are less intrusive of an individual subscriber's privacy than unwanted live telemarketing because autodialed calls are the easiest to reject. 29/ However, the Commission does not need to address this question. Congress has made clear that all unsolicited telemarketing is a potential invasion of privacy, and the Commission must adopt regulations to permit consumers to protect themselves against both live and automated calls.

27/ 137 Cong. Rec. H11,310 (emphasis added) (statement of Rep. Markey).

28/ Id. (emphasis added) (statement of Rep. Rinaldo). The Commission points to other statements by Congressmen Markey and Rinaldo to support the premise that auto dialed calls are a greater nuisance than live solicitations. See Notice at para. 25. However, the statements cited above clearly indicate that these sponsors envisioned strong restrictions on both live and auto dialed calls.

29/ By granting a private right of action to enforce the rights under the TCPA, § 2(c)(5), Congress further indicated its extreme concern for individual privacy rights. The public safety concerns of auto dialers and automated messages might adequately have been protected by the vigilance of public officials such as state attorneys general. The distinct injury to individual privacy by live solicitation calls, however, demands private relief for those individuals.

C. Call restrictions also benefit the overall telemarketing industry.

LeJeune is aware that some segments of the telemarketing community opposed the TCPA, and may oppose effective implementation of the Act by the Commission. However, such criticism should not be interpreted as the view of the entire industry. As a significant contributor to the telemarketing industry, LeJeune believes that appropriate restrictions actually advance the interests, not only of the public, but of solicitation firms as well.

First, telemarketers will find it far simpler to comply with a single national system than a hodge podge of individual state laws. LeJeune has observed that telemarketing restrictions are already under consideration in many states. The costs of compliance with multiple laws could chill efficient use of telemarketing to reach otherwise willing customers, or at least reverse the trend toward nationwide telemarketing services. Appropriate federal regulations will ensure that the telemarketing industry continues to contribute fully to the economy while meeting its obligations to the public.

Second, many telemarketers actually waste money due to the lack of effective restrictions on unsolicited calling. Valuable sales staff time is lost for every call made to an unreceptive customer whose telephone number might have been on

a restricted list. If that call is inadvertently repeated, even more money is lost. Long distance toll charges are also wastefully inflated.

Third, restrictions on telephone solicitation would prevent abuses by some marketers from tarnishing the image of the entire industry. The telemarketing industry serves a valid public interest when it conducts its business lawfully and courteously. But as Congressman Cooper observed in the House debates: "Unwanted calls are tainting the wanted ones and make [citizens] cringe at the thought of answering the telephone at night." 30/ The TCPA was enacted because past efforts at self-regulation have not been effective.

A classic economic commons problem is at work here. As long as most telemarketers do not make the investment to self-regulate, no individual firm will invest its money to do so. Even to the extent that firms suffer efficiency losses from unrestricted calling, they do so nearly across the board. Economic incentives do not encourage them to step out alone to restrict their operations. Consumers bear most of the costs of unrestricted calling in time and annoyance, while firms reap the profits of a virtually unlimited calling base.

30/ 137 Cong. Rec. H11,312 (statement of Rep. Cooper).

One of Congress's purposes in enacting the TCPA was to remove costs from the shoulders of individual telephone subscribers. 31/ The telemarketing industry should bear the costs characteristically created by the conduct of its business. The bulk of the costs of telemarketing in terms of the invasion of privacy rights identified by Congress are currently externalized upon consumers. Private economic incentives do not encourage firms to internalize these costs. Consequently, regulation of telemarketing must place this burden squarely back upon the telemarketing industry, which is the cheapest cost avoider.

Congress has determined that unwanted live telephone solicitations are a significant invasion of telephone subscribers' privacy rights. That determination is embodied in the TCPA, which directs the Commission to make appropriate rules to protect those rights. All that remains for the FCC is to determine the most cost-effective methods and procedures to adopt. As discussed in the next Section, LeJeune believes that a national database system best meets this requirement of the Act.

31/ 47 U.S.C. § 227(c)(2) also prohibits passing any additional charges on to consumers.

II. A NATIONAL DATABASE CAN BE IMPLEMENTED ECONOMICALLY
USING TODAY'S TECHNOLOGY.

The original legislation addressing telephone solicitations would have mandated development of a national "Do Not Call" database. Congress subsequently decided to give the Commission the option to adopt alternative methods, apparently out of a concern that the database might be unduly expensive and time-consuming to implement. Nevertheless, a strong interest in a national database system continues to be reflected in the detailed database provisions that remain in the TCPA. Senator Pressler, for example, observed that: "Personally, and in the eyes of many others, it appears that an electronic database clearly offers the most promising protection for consumers." 32/

Congress was correct that it is not currently feasible to deploy a fully interactive on-line central database that would permit blocking of unwanted solicitations from the moment a consumer's number is entered. However, substantially all the benefits of a national database system can be obtained if the information is distributed to telemarketers on a regular basis in the form of computer tapes, data diskettes, or printed media.

32/ 137 Cong. Rec. S16,202 (statement of Sen. Pressler).

Indeed, such a system -- already proven workable in Florida -- provides by far the most flexible and cost-effective means of addressing the concerns raised by Congress in the TCPA. This database could be efficiently managed with minimal government oversight, without any government funding, and at no cost to telephone customers. By creating a single source of consumer "Do Not Call" numbers, the Commission could meet the needs of Congress, consumers, telemarketers, and even state regulators in a single move. Moreover, the Commission could accomplish these objectives while simultaneously reducing the financial and administrative burden of compliance by telemarketing firms.

A. The Florida database system provides a model that can be adopted at the national level.

LeJeune has previously discussed enactment of the Florida Telephonic Sales Act in 1990. The Florida database is maintained solely by funds obtained from consumers in the form of subscription fees and from telemarketers purchasing the list for compliance. The database is administered by the Division of Consumer Services of the Florida Department of Agriculture and Consumer Services. Consumers call a toll-free number to request an application. After completing the application, which provides the state with their address for verification, and returning it with the \$10.00 fee, the consumer's phone number is included in the database.